In The

Supreme Court of the United States

October Term, 1976

No. 76-1736

WALTER J. MEYER,

Petitioner,

vs.

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court.

Petitioner, Walter J. Meyer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final in this proceeding on March 9, 1977.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York, rendered by Judge Mark A. Costantino is reported at 409 F. Supp. 1240 (E.D.N.Y. 1976). That of the Court of Appeals, affirming the judgment of the District Court is not yet reported. The order of the Second Circuit, denying *en banc* reconsideration was made on March 9, 1977.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 12, 1977. A timely petition for rehearing *en banc* was denied on March 9, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Do considerations of federalism, the overriding interest of providing a federal forum to redress federal constitutional rights independent of any remedy afforded by state law, and the desire to prevent unnecessary initiation of civil rights actions in the federal courts justify adoption of the ruling of the Fifth Circuit in *Mizell v. North Broward Hospital District,* 427 F.2d 468 (5th Cir. 1970) providing for tolling of the statute of limitations of a civil rights action during the period of state court litigation between the same parties designed to resolve the alleged wrongs committed by state officials against state employees under state law?

STATUTES INVOLVED

The statutes involved, although their terms are not dispositive, are Title 42, U.S.C. §§ 1983 and 1985, and New York Civil Practice Law and Rules §§ 214 and 217, which state, in relevant part:

"Title 42 U.S.C. §1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"Title 42 U.S.C. §1985. Conspiracy to Interfere With Civil Rights — Preventing Officer From Performing Duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in

any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as

an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

"N.Y. CPLR, §214.

The following actions must be commenced within three years:

* * *

2. . . . an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215; . . . ."

"N.Y. CPLR §217. A proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final, or after the body or officer refuses, after demand, to perform its duty."

STATEMENT

Petitioner, a veteran and resident of Nassau County, was duly appointed as a Patrolman to the Nassau County Police Department (hereinafter referred to as "the Department") on October 1, 1953. In 1960 he was promoted to the rank of Detective in the Department. Petitioner maintained a totally unblemished record in the Department, faithfully complying with all rules and regulations thereof, throughout his almost eighteen (18) year career.

On June 25, 1970, a Nassau County Grand Jury indicted petitioner and another Department Detective for the crime of an attempt to commit the crime of grand larceny in the first degree. Both men pleaded not guilty to this charge. This same day petitioner was suspended, without pay, from the Department; his guns and badge were, accordingly, removed.

On July 2, 1970, petitioner was charged by the Department with certain violations of the Department's Rules and Regulations based upon and with the specification limited to the identical charge and allegation for which petitioner stood criminally indicted. Similarly, a plea of not guilty was entered in this civil proceeding.

A departmental trial on these charges was first scheduled for November 30, 1970 and adjourned on several occasions to April 8, 1971 due to petitioner's counsel's actual engagement, and upon request of petitioner's counsel. On April 8th the hearing was adjourned to April 22nd, at the request of the defendants.

On April 22, 1971, petitioner's counsel requested another adjournment. When such motion was denied by respondent Quinn, petitioner was advised by his counsel to stand mute and without the aid of counsel so as not to incriminate himself or otherwise prejudice his position in the then pending criminal

prosecution. Petitioner's counsel feared that petitioner would be called as a witness in the civil proceeding, and thus be forced to give testimony possibly prejudicial to his defense in the pending criminal action. Nevertheless, at the respondent Quinn's orders, the departmental trial commenced that day.

As a result of petitioner standing mute and alone throughout the departmental trial, he was found guilty of the charges by respondent Quinn, and dismissed from the Department by order of respondent Frank on June 4, 1971.

This was the first and only instance to date in the history of the County of Nassau that a police officer facing both criminal and resulting departmental charges was forced to trial at the administrative level before his criminal trial took place.

The criminal case against petitioner was called to trial for the first time on January 5, 1972. The petitioner was tried jointly with Detective Cullinan in the Supreme Court of the State of New York, Nassau County. A jury was selected on January 10, and found a verdict of not guilty as to both men on January 14, 1972.

In August 1971, petitioner's application pursuant to Article 78 of the New York CPLR to review and annul respondents' determination dismissing petitioner from the Department on the sole and exclusive ground that the respondents arbitrarily and unreasonably deprived petitioner of his right to counsel of his choosing by virtue of their failure to grant petitioner a further adjournment when petitioner's counsel was actually engaged, was dismissed in the New York State Supreme Court, Nassau County. This judgment was affirmed, without opinion, by the Appellate Division, Second Department on October 10, 1972. In July 1973, motion for leave to appeal was denied by the New York State Court of Appeals.

On January 15, 1974 a verified petition on behalf of the petitioner was served on respondents asking for a rehearing and

reconsideration of the dismissal of petitioner from the Department. On April 9, 1974, petitioner was advised in writing that his application would not be considered.

By service upon the respondents on June 10, 1975 of a summons and complaint, petitioner in the instant proceeding sought declaratory relief founded upon Title 42, United States Code, Sections 1983 and 1985 to redress the deprivation under color of law, of rights, privileges and immunities secured by the Constitution and laws of the United States. More specifically, sought to be redressed was the fundamental right not to be compelled to give testimony which could be used in criminal prosecution, as guaranteed by the Fifth Amendment to the Constitution of the United States. Petitioner sought to annul the actions of the respondents, who, under color of law, and under color of their authority as police officials of Nassau County, subjected petitioner to the deprivation of his right not to be compelled to give testimony which could be used to prosecute him criminally, and not to be deprived of the personal liberty to pursue a calling of his choice without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The respondents moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint, *inter alia*, on the ground that the action was not timely instituted, as provided by Section 214(2) of the New York State Civil Practice Law and Rules.

By memorandum and order dated March 11, 1976 the District Court granted the respondents' motion to dismiss on the ground that the petitioner's action was barred by the statute of limitations.

Petitioner sought a ruling that the concededly applicable*

* Title 42 U.S.C. Sections 1983 and 1985 do not contain specific statutes of limitations. Thus, the federal courts apply the most analogous state statute of limitations. However, federal courts are not bound by state rules regarding tolling of the state statute of limitations. *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974).

New York State statute of limitations, CPLR §214 (three years) had been tolled by the pursuit by him of state administrative and judicial remedies seeking the same result. The District Court held that *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454 (1975), barred such relief, and dismissed the complaint (see Appendix A, *infra*, at 1a).

The Second Circuit affirmed the judgment of the District Court by a two-to-one decision (Smith, Timbers, J.J, Oakes, dissenting) (Appendix B, *infra*, at 8a). Both majority and dissenting opinions disagreed with the District Court conclusion that *Johnson v. Railway Express Agency Inc., supra*, mandated dismissal. Affirmance was based upon a reluctance to follow the Fifth Circuit's decision in *Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468 (5th Cir. 1970), *reh. en banc den.* (1970) upon the facts presented. Judge Oakes would have followed *Mizell* (Appendix at 16a).

REASONS FOR GRANTING THE WRIT

The writ should be granted to protect three fundamental and important interests:

1. To preserve to litigants their rights to pursue the supplemental remedies afforded by the Civil Rights Act;

2. To preserve to the states the opportunity to resolve through their own administrative and judicial remedial machinery questions of state law, and thus promote the interests of federalism, comity and abstention;

3. To resolve the conflicts between the decision of the Second Circuit in the instant case, and that of the Fifth Circuit in *Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468 (5th Cir. 1970), *reh. en banc den.* (1970) and thus to promote uniformity and predictability within the federal court system.

All of these interests are endangered by the Second Circuit's refusal to apply *Mizell, supra,* in this case; the resultant uncertainty of the law requires resolution of the issues squarely presented to this Court.

The issues herein are similar to those decided by this Court in *Johnson v. Railway Express Agency, Inc., supra,* insofar as both cases involved the question of whether the commencement of one mode of remedial action tolls the period of limitation applicable to an action based on the same facts. One important difference between the two cases is that while the Court in *Johnson* refused to "infer any positive preference", *Johnson v. Railway Express Agency, Inc.,* 421 U.S. at 461, between two modes of available *federal* redress, the principles of federalism, present herein, compel the federal courts to encourage the resolution of the issues in state court prior to institution of federal suit. Particularly, the instant suit involves the clear preference for state resolution of alleged wrongs committed by state officials against state employees.

The Fifth Circuit, in *Mizell,* relied heavily on principles of federalism in tolling the statute of limitations applicable to a federal civil rights action during state judicial action seeking the same results in order to encourage the utilization of state procedures to redress alleged wrongs of state officials. Although these principles appear consonant with previous Second Circuit decisions enunciating the interests and protections applicable to actions under the Civil Rights Act, cf., *Lombard v. Bd. of Educ.,* 502 F.2d 631 (2d Cir. 1974) and *Kaiser v. Cahn,* 510 F.2d 282 (2d Cir. 1974), the majority of the court herein declined to follow *Mizell* and refused to toll the statute of limitations.

The majority claimed that its refusal to follow *Mizell* was predicated upon the fact that petitioner herein raised *a* federal question in his state action, although the federal question was not the same as that sought to be adjudicated in the federal action. That this is a distinction without a difference is clearly seen from Judge Coleman's dissent in *Mizell,* which notes that

Mizell's state actions encompassed due process considerations. *Mizell, supra* at 475-76. Thus, the majority opinion has, in spite of its disclaimer of intention to do so, rejected *Mizell.*

The dissenting opinion of Judge Oakes below recognized both the power of the federal courts to create a tolling rule, and the preferability of creating such a rule on the facts here presented. According to Judge Oakes, the adoption of the *Mizell* rule would encourage state solutions to state problems, avoid unnecessary filings of §1983 actions, and further the underlying purpose of the Civil Rights Act (Appendix at 17a).

The practical implications of this rejection of *Mizell* have far-reaching and disturbing consequences. To avail himself of the rights afforded him by the state and federal laws, each litigant allegedly wronged by a state official is now forced to pursue both remedies based on the same set of facts and seeking identical results, simultaneously, or risk loss of the substantial, independent and supplementary federal right. *Monroe v. Pape,* 365 U.S. 167 (1961). The right to federal adjudication of federal questions predicated on the Civil Rights Acts will be barred unless federal suit is begun, in most cases, prior to resolution of state questions by state courts. Two suits based on the same facts will have to be simultaneously litigated, in spite of the very real possibility that resolution of the state claims would obviate the need for consideration of the federal claims.

Such duplicity will result in the unnecessary initiation of federal Civil Rights Act suits during the course of parallel state court action, increasing the burdens on our overworked federal courts.

If given the opportunity, petitioner will present to this Court a well-documented argument that adoption of the *Mizell* solution to this problem will foster and preserve the venerated principles of federalism while preserving to litigants the opportunites afforded them to pursue all rights granted by law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue its writ of certiorari to review the decision below.

Respectfully submitted,

s/ Frederick A. Rossetti
Attorney for Petitioner

David B. Ampel
Ira Leitel
Of Counsel

APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DISMISSING THE COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WALTER J. MEYER,

Plaintiff,

v.

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department,

Defendants.

75-C-898

ROBERT J. CULLINAN,

Plaintiff,

v.

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department,

Defendants.

Appendix A

75-C-1446

MEMORANDUM AND ORDER

COSTANTINO, D.J.

The motions to dismiss in the two above named cases involve identical legal issues. Since the underlying facts are likewise identical, both motions are considered in this opinion.

Before examining the legal issues involved, a brief recitation of the facts is necessary. Messrs. Cullinan and Meyer were long-standing members of the Nassau County Police Department when, in 1970, a Nassau Grand Jury indicted them both for attempted grand larceny in the first degree. Both men pled not guilty.

On the day of indictment both Cullinan and Meyer were suspended from the police department without pay; subsequently, on July 2, 1970 both men were charged by the department with violations of department regulations. They both entered not guilty pleas in this civil proceeding.

A departmental trial scheduled for November 30, 1970 was adjourned several times until April 22, 1971. On that date, plaintiffs' requests for a further adjournment were denied and the departmental trial commenced.

On advice of counsel, both men appeared without counsel and refused to testify on their own behalf. Defendant Quinn, who was the trial examiner, found them guilty of the charges. On June 4, 1971 defendant Frank ordered that they be dismissed from the force.

Appendix A

In January 1972, the criminal case went to trial. On January 14, the jury returned a verdict of not guilty as to both men.

Both of the plaintiffs herein brought Article 78 proceedings in the state court seeking to set aside their removal on the grounds that they were denied their right to counsel in the administrative hearing. The Article 78 proceedings were dismissed by the New York State Supreme Court, Nassau County in August 1971. The Appellate Division, 2d Department affirmed in October 1973 and in May 1973 Cullinan was denied leave to appeal by the Court of Appeals.[1] Later, both plaintiffs petitioned defendant Frank to reconsider his order of dismissal. Reconsideration was denied. Both the New York State Supreme Court and the Appellate Division affirmed the denial of reconsideration.

Plaintiffs filed these actions alleging jurisdiction pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §§1983, 1985. Meyer's suit was commenced by service of summons and complaint on June 10, 1975. Cullinan's summons and complaint were served on September 5, 1975. The gravamen of plaintiffs' complaints is that the departmental trial violated their Fifth Amendment privilege against self-incrimination and their Fourteenth Amendment right to due process of law.

Defendants Frank and Quinn have moved to dismiss the complaints on various grounds. Since this court agrees that the action is barred by the statute of limitations, the other grounds need not be considered.

In determining the timeliness of an action brought under the Civil Rights Act, the federal court borrows the most analogous state statute of limitations. *Swan v. Board of Higher*

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1. The Court of Appeals denied Meyer leave to appeal in July 1973.

Education, 319 F.2d 56 (2d Cir. 1963); *see O'Sullivan v. Felix*, 233 U.S. 318 (1914). The three-year statute of limitations prescribed by New York CPLR §214(2) (McKinney's 1963) is the most appropriate state statute for the cases at bar. *See Ortiz v. LaVallee*, 442 F.2d 912, 914 (2d Cir. 1971).

Since plaintiffs were dismissed from the Police Department in June of 1971 there is no question that, absent a tolling of the statute, these actions would be barred by the statute of limitations. Plaintiffs rely on *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974) and *Mizell v. North Broward Hospital District;* 427 F.2d 468 (5th Cir. 1970), *reh. en banc den.* (1970), in arguing that the statute was, or should have been, tolled by bringing the state court action, and that it did not begin to run again until mid 1973 when leave to appeal to the Court of Appeals was denied.

Nothing in *Kaiser* compels a decision that the statute should be tolled by the state court action. *Mizell* did not explicitly rule on the question of whether the statute of limitations therein should have been tolled, but merely remanded to the district court for reconsideration of that question in light of the federal policies involved.

The *Mizell* approach has been criticized and sharply limited by other courts, *see, e.g.*, both the District Court and Court of Appeals decisions in *Ammlung v. City of Chester*, 355 F. Supp. 1300 (E.D. Pa. 1973); *aff'd* 494 F.2d 811 (3d Cir. 1974). Moreover, in *Blair v. Page Aircraft Maintenance*, 467 F.2d 815 (5th Cir. 1972), Judge Tuttle, who wrote the majority opinion in Mizell, stated that the 5th Circuit Court of Appeals had overruled *Mizell sub silentio* by failure to consider its application to the facts in *Blair*, 467 F.2d at 821 (Tuttle, J., dissenting). It is not necessary, however, to determine to what extent *Mizell* has been overruled by Blair or limited by

Ammlung because the Supreme Court has recently set forth guidelines to be considered in determining whether federal courts should fashion a tolling provision when dealing with a state statute of limitations. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

In *Railway Express*, plaintiff argued that the state statute of limitations, applicable to his §1981 claim, should have been tolled by his timely filing of an employment discrimination charge based on the same facts with the Equal Opportunity Commission. The Court began its analysis with the proposition that although federal policy considerations may sometimes overrule inconsistent state statutes of limitation, federal courts generally should rely on the state's "wisdom" as to time limitations and tolling periods. 421 U.S. 464-65. The Court expressly noted, however, that the filing of a Title VII claim was not a prerequisite to bringing a §1981 action, and that the two avenues of relief were independent, 421 U.S. at 460. Johnson (the plaintiff in that case) could have filed his §1981 action at any time after his cause of action had accrued; had he done so he could then have asked that the §1981 proceedings be stayed until the Title VII claim was determined. 421 U.S. at 465-66. Accordingly, the court found no persuasive federal policy requiring that the statute be tolled, and therefore held that the action was barred by the statute of limitations.

The analysis in *Railway Express* leads to a similar conclusion in the cases at bar. In interpreting the Civil Rights Act, the Supreme Court has pointed out that

> [t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

Appendix A

Furthermore, an adverse decision in state court is not necessarily a bar to the federal suit. *Lombard v. Bd. of Education,* 502 F.2d 631 (2d Cir. 1974). In *Lombard,* plaintiff raised issues of statutory construction in the state court and then sought to raise constitutional issues in the federal court. In holding that the federal suit was not barred by the doctrines of res judicata or collateral estoppel, the Court of Appeals said:

> Here, even if we would like to put all the issues in the same court, we are better off not to compel the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court [citations omitted] That is what we think choice of forum means in Civil Rights Act cases. 502 F.2d at 636.[2]

Under *Lombard,* plaintiffs' right to bring these claims at all, is directly dependent upon a finding that the claim advanced in state court was different from the claim advanced in federal court. If, however, the claims are different and alternative to each other, then the reasoning in *Railway Express* must control. As was true in *Railway Express,* plaintiffs could have filed their suits at any time after the cause of action accured. By failing to do so, they, like the plaintiff in *Railway Express* have "slept" on their rights.

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2. The cases at bar are clearly distinguishable from *Lombard* in that here plaintiffs have raised one constitutional issue (right to be represented by counsel) in state court and now seek to raise two other constitutional issues (right against self incrimination and right not to be deprived of their calling without due process of law) in federal court. For purposes of determining whether the suit is time barred, it will be assumed that plaintiffs may validly raise these claims in federal court; nevertheless, it must be noted that plaintiffs are arguably seeking two bites at the "cherry." *Lombard, supra* at 637.

Appendix A

In *Railway Express,* the Supreme Court adopted a narrow view of the impact of that case on federal policies. 421 U.S. at 467, fn. 13. Whether the impact of the cases at bar is viewed narrowly or broadly, no federal policy persuades this court that the statute of limitations should be tolled under these circumstances.

Accordingly, the motions to dismiss are granted.

s/ Costantino, D.J.
U. S. D. J.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 66—September Term, 1976.

(Argued October 22, 1976 Decided January 12, 1977.)

Docket No. 76-7172

WALTER J. MEYER,

Plaintiff-Appellant,

v.

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department,

Defendants-Appellees.

Before:

SMITH, OAKES and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Eastern District of New York, Mark A. Costantino, *District Judge,* 409 F. Supp. 1240, which dismissed complaint in a civil rights action as barred by the three-year New York statute of limitations, the sole issue

being whether the statute of limitations should be tolled while plaintiff pursued a remedy in the state courts.

Affirmed.

Ira Leitel, New York, N.Y. (David B. Ampel, New York, N.Y., on the brief), *for plaintiff-appellant.*

Joseph A. Demaro, Deputy County Atty. of Nassau County, Mineola, N.Y. (James M. Catterson, Jr., County Atty. of Nassau County, Natale C. Tedane, Senior Deputy County Att., and Kenneth P. Morelli, Law Asst., Mineola, N.Y., on the brief), *for defendants-appellees.*

Timbers, *Circuit Judge:*

The question presented on this appeal is whether in a civil rights action under Sections 1983 and 1985 the applicable three-year New York statute of limitations should be tolled during the period plaintiff pursued a remedy in the New York state courts. Under the circumstances of this case, we hold that it should not. Accordingly, we affirm the judgment of the district court which dismissed the complaint as time-barred.

I.

Walter J. Meyer was a detective in the Nassau County Police Department (the Department). On June 25, 1970 a Nassau County grand jury indicted him and another detective for attempted first degree grand larceny. On January 1, 1972 a jury acquitted Meyer of this charge.

Before the criminal trial began, the Department conducted

Appendix B

and concluded administrative proceedings to dismiss Meyer. On July 2, 1970, Meyer was charged with a violation of Department rules. The departmental charges were based on the same conduct charged in the indictment. A departmental trial initially was scheduled for November 30, 1970. Repeated adjournments, all except one due to the unavailability of Meyer's counsel, resulted in its postponement until April 22, 1971. On that date Meyer's counsel again was absent. His substitute counsel requested another adjournment. The trial commissioner, appellee Quinn, denied this request but informed Meyer that he could stand mute. On the advice of his substitute counsel, Meyer did remain mute while the Department presented its case. When the Department rested, Quinn adjourned the trial until April 27 and informed Meyer that he could present his case at that time. When the hearing resumed on April 27, Meyer again stood mute. Quinn found him guilty. On June 4, 1971, he was dismissed from the Department.

Two months after his dismissal from the force, Meyer commenced an Article 78 proceeding[1] in the Nassau County Supreme Court to review the action which resulted in his dismissal. His petition alleged various state law claims. It also alleged that the Department's action in trying him without the assistance of counsel of his choosing violated his federal constitutional rights to counsel and to confront witnesses. On July 15, 1971 the Article 78 petition was dismissed by Justice Pittoni of the Nassau County Supreme Court. The Appellate Division, Second Department, affirmed without opinion on October 10, 1972, 40 App. Div. 2d 760, 336 N.Y.S.2d 239 (2nd Dept. 1972) (mem.), and denied Meyer's motion for reargument

1. Pursuant to N.Y. Civ. Prac. Law §7801 (McKinney 1963).

Appendix B

on January 19, 1973. In July 1973 the New York Court of Appeals denied leave to appeal[2].

On June 6, 1975 Meyer commenced the instant civil rights action in the Eastern District of New York.[3] His complaint alleged that his subjection to a departmental trial violated his Fifth Amendment privilege against self-incrimination and that his subsequent dismissal deprived him of the pursuit of his calling without due process of law. On March 12, 1976 Judge Costantino filed his opinion, 409 F.Supp. 1240, granting appellees' motion to dismiss the complaint as barred by the applicable three year New York statute of limitations. From the judgment entered the same day, this appeal was taken.

II.

An action brought under the federal Civil Rights Act is subject to the statute of limitations the state courts would apply in an analogous state action. Accordingly, the three year New York statute of limitations[4] governs Meyer's instant §1983 claim. *Ortiz v. LaVallee*, 442 F.2d 912 (2 Cir. 1971); *Swan v. Board of Education*, 319 F.2d 56 (2 Cir. 1963).[5] Since Meyer's self-

2. On January 15, 1974 Meyer requested the Department to reconsider his dismissal. The request was denied on April 9, 1974.

3. Pursuant to 42 U.S.C. §§1983 and 1985 (1970) and their jurisdictional implementation, 28 U.S.C. §1343(3) (1970).

4. N.Y. Civ. Prac. Law §214(2) (McKinney Supp. 1975) which includes actions "to recover upon a liability, penalty or forfeiture created or imposed by statute. . . ."

5. We apply §214(2) to Meyer's §1985 claim as well. See generally *Nevels v. Wilson*, 423 F.2d 691 (5 Cir. 1970) (per curiam); *Wakat v. Harlib*, 253 F.2d 59, 63-64 (7 Cir. 1958). Our conclusions below regarding the tolling of the limitations period for the §1983 claim apply likewise to the §1985 claim.

incrimination and due process causes of action accrued no later than June 4, 1971, the date of his dismissal from the force, the instant civil rights action commenced four years later is time-barred unless a tolling principle applies so as to excuse the year's delay. Meyer urges us to create a toll for the period during which he pursued a remedy in the state courts. Specifically, he urges us to toll the twenty-three month period from August 1971 to July 1973 so as to render the instant civil rights action timely.

It is well settled that the federal courts have the power to toll statute of limitations borrowed from state law in appropriate circumstances. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975); *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2 Cir.), *cert. denied*, 368 U.S. 821 (1961). We recently have affirmed the applicability of this principle in the context of a §1983 cause of action. *Kaiser v. Cahn*, 510 F.2d 282, 286-87 (2 Cir. 1974).

Whether to toll in a particular case has been stated in terms of whether application of the borrowed state statute of limitations would frustrate the policy underlying the federal cause of action asserted. *Johnson v. Railway Express Agency, Inc., supra*, 421 U.S. at 465; *Burnett v. New York Central R.R.*, 380 U.S. 424, 426-27 (1965). The inquiry pursued in the cases, however, is somewhat broader than this statement implies. In practice, resolution of the tolling question involves striking a balance between protection of the substantive federal policy under consideration on the one hand and protection of the policy behind the statute of limitations on the other hand. The plaintiff's conduct — particularly his diligence in pressing his claim — also is taken into account. *Johnson v. Railway Express Agency, Inc., supra*, 421 U.S. at 465-67; *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 708 (1966); *Burnett v. New York*

Central R.R., supra, 380 U.S. at 428; *Blair v. Page Aircraft Maintenance, Inc.*, 467 F.2d 815 (5 Cir. 1972).

The remedial policy underlying §1983,[6] considered alone, would not be impinged upon by applying the three year limitations period here. Since §1983 plaintiffs are not required to exhaust state remedies, *Monroe v. Pape, supra* note 6, at 183, federal relief was available to Meyer all along. In consequence, the gravamen of his argument in support of a toll lies in federalism considerations of a general species. His theory is that the strong federal interest in redressing deprivations of constitutional rights manifested in §1983 conflicts with a concomitant federal concern for encouraging the initial utilization of state agencies and courts for the vindication of wrongs committed by the state's agents. These can be accommodated, so the argument goes, only if a tolling principle assures the potential state court litigant of the residual availability of a §1983 action. The Fifth Circuit adopted this reasoning in *Mizell v. North Broward Hospital District*, 427 F.2d 468 (5 Cir. 1970), and tolled the period during which a §1983 plaintiff had challenged an administrative ruling within the agency and in the state courts[7].

---

6. The purpose of §1983, as explicated by the Supreme Court in *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), is to provide a federal remedy for federal constitutional rights where the remedy afforded by state law is either inadequate or unavailable as a practical matter.

7. The Fifth Circuit held:

> "[It] is clearly within the purpose of the Civil Rights Acts to encourage utilization of state administrative and court procedures to vindicate alleged wrongs *under a state-created cause of action* before requiring a plaintiff to bring his federal suit to prevent his being barred by a state statute of limitations." (emphasis added) 427 F.2d at 474.

Meyer invites us to apply *Mizell* here. Assuming arguendo our agreement with the result reached there, the history of the instant litigation forecloses application here of the full force of the Fifth Circuit's reasoning. Meyer did not restrict his Article 78 petition to claims grounded in state law. Alleged violations of his Sixth Amendment rights to counsel and confrontation of witnesses were at the core of his petition. This is not a case like *Mizell* where the prior state court proceeding was directed at obtaining relief through an action grounded solely in state law.[8] *Id.* at 470-71, 474. The only thing Meyer has held in reserve has been the federal court itself; federal law has played a principal role all along. The result is that the policy of avoiding federal interference with state affairs survives here in a diluted posture.

We turn now from the federal system interest consideration to the other relevant consideration, i.e. statute of limitations policy and Meyer's conduct of the litigation.

The policy of repose behind the statute of limitations protects defendants "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 343, 348-49 (1944). It also protects the courts by relieving "the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett v. New York Central R.R., supra,* 380 U.S. at 428. Meyer's conduct is the sort against which both of these considerations are directed.

8. We intimate no opinion as to how we would rule in a case indistinguishable from *Mizell.*

Unlike *Burnett,*[9] where the plaintiff's cause of action was precisely the same in two successive suits and the defendant could not have relied on the policy of repose, this is a case where Meyer has prosecuted two different actions. Upon the conclusion of the state court action, which included state and federal claims, appellees hardly could be said to have been put on notice that an action in the federal court grounded on a different constitutional theory would follow two years later. The inference is just the opposite and brings to appellees' side the policy of repose.[10]

Moreover, Meyer has slept on his rights "in a very real sense." *Johnson v. Railway Express Agency, supra,* 421 U.S. at 466. In *Johnson,* limitations ran on the plaintiff's §1981 action in the mids of his efforts to obtain statutory relief from the Equal Employment Opportunity Commission. The Supreme Court faulted his conduct on the ground that a §1981 action could have been brought at any time after his cause of action

9. The plaintiff in *Burnett* began a timely FELA action in a state court only to have it dismissed for improper venue. The FELA limitations period run out in the course of the state action. The Supreme Court held that the statute should be tolled during the period of the pendency of the state action so as to allow the plaintiff an action in the federal court. *Id.* 380 U.S. at 428.

10. Under *Johnson v. Railway Express Agency, Inc., supra,* it may be that the factual question of whether the defendant was in a state of repose need be considered only when, as in *Burnett,* the two causes of action are the same. In other cases, an actual state of repose apparently may be presumed:

> "Only where there is complete identity of the causes of action will the protections [of the defendant's interests] suggested . . . necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period. . . ." *Id.* at 467, 468 n.14.

accrued.[11] *Id.* Lack of diligence weighs even more heavily against Meyer. Not only might he have resorted to the federal court in the first instance, but he also had eleven months after the New York Court of Appeals denied leave to appeal in July 1973 before the three-year limitations period ran out. See *UAW v. Hoosier Cardinal Corp., supra,* 383 U.S. at 708.

We hold that the federalism considerations urged by Meyer are of insufficient substance to outweigh the statue of limitations policy so directly brought to bear by the facts of this case.[12]

Affirmed.

Oakes, *Circuit Judge* (dissenting):

I dissent.

I would follow *Mizell v. North Broward Hospital District,* 427 F.2d 468 (5th Cir. 1970). There the Fifth Circuit held that pursuit of state administrative and judicial remedies by a

11. The question in *Johnson* was whether the timely filing of a charge with the EEOC tolls the applicable state limitations period for an action under 42 U.S.C. §1981 (1970). The Court held that it does not, relying on Congress' intent that administrative proceedings under Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 (1970), and suit in court order §1981 be "separate, distinct, and independent." 454 U.S. at 460-61, 465-66. See also *Electrical Workers Local 790 v. Robbins and Myers, Inc.,* ___ U.S. ___, 45 U.S.L.W. 4068 (U.S. Dec. 20, 1976). *Johnson* in no sense controls on the issue now before us, for the question of federalism policy presented in this case was not presented there. Nevertheless, we note the considerable weight *Johnson* places on upholding statute of limitations policy. *Id.* at 463-67, and 467 n.14.

12. In view of our holding above, we find it unnecessary to reach appellees' contention that Meyer's litigation of federal questions in his Article 78 proceeding bars the instant §1983 action on the ground of res judicata.

dismissed local government employee tolled the statute of limitations applicable to the employee's later-filed action under 42 U.S.C. §1983. Judge Tuttle for the court reasoned that "under our system of federalism aggrieved persons should be encouraged to utilize state procedure before appealing to the federal courts . . . ," *id.* at 474; failure to toll the §1983 statute of limitations while state remedies are being pursued would cause unnecessary filings of §1983 actions and would defeat an "underlying purpose of the Civil Rights Acts," *id.*[1] Two crucial premises upon which the Fifth Circuit based its holding — that state remedies are separate and independent from §1983 remedies, and that federal courts, while in general applying state statutes of limitations to §1983 actions, have the authority and the obligation to create their own tolling rules when necessary, *id.* at 473-74 — have since been recognized as valid by our circuit. *Lombard v. Board of Education,* 502 F.2d 631, 635-37 (2d Cir. 1974) (federal claim under §1983 separate from state claim), *cert. denied,* 420 U.S. 976 (1975); *Kaiser v. Cahn,* 510 F.2d 282, 286-87 (2d Cir. 1974). In the latter case, in reference to a §1983 claim, we said:

1. In the Fifth Circuit *Mizell v. North Broward Hosp. Dist.,* 427 F.2d 468 (5th Cir. 1970), remains good law, *see Guerra v. Manchester Terminal Corp.,* 498 F.2d 641, 649 n.13 (5th Cir. 1974), despite some earlier concern about its demise, *see Blair v. Page Aircraft Maintenance, Inc.,* 467 F.2d 815, 821 (5th Cir. 1972) (Tuttle, J., dissenting) (suggesting possibility of "sub silentio" overruling of *Mizell* by majority). The case of *Ammlung v. City of Chester,* 494 F.2d 811, 816 (3d Cir. 1974), did criticize the "fashioning [of] federal tolling principles" in *Mizell,* but that aspect of *Mizell* has already been approved by the Second Circuit (without reference to *Mizell*) in *Kaiser v. Cahn,* 510 F.2d 282, 286-87 (2d Cir. 1974). *Ammlung,* moreover, indicated that *Mizell* could be considered sound on its "peculiar facts," facts also extant in this case: *Mizell* involved "the utilization of state administrative procedures and the state courts to reinstate a privilege revoked by the state," and "the plaintiff's success in having his [job] reinstated at the state level would have obviated the need for a federal civil rights action." 494 F.2d at 816.

Appendix B

> We may in applying federal law to a claim based on a federal statute prevent a result that would substantially impair a valid federal interest. Thus a borrowed state statue of limitations may be tolled in conformity with federal doctrine where the right is the creature of federal statute, Holmberg v. Ambrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) . . .
>
> We think that civil rights claimants, as well as seamen are entitled to, in the words of Mr. Justice Black "full benefit of federal law". Garrett v. Moore-McCormack Co., 317 U.S. 239, 243, 63 S.Ct. 246, 87 L.Ed. 239 (1942).
>
> In sum, we do not feel that we are necessarily bound by the state's determination of when its statute of limitations is tolled where the question arises in a civil rights claim in the federal court.

510 F.2d at 287.

The majority distinguishes *Mizell* on the basis that appellant "did not restrict his [state court] petition to claims grounded in state law." Majority op., *ante* at — . But appellant did not make the same federal claim in state court as he makes here; as the majority points out, "the core" of his federal claim in his state petition was "[a]lleged violations of his Sixth Amendment rights to counsel and confrontation of witnesses . . . ," *id.* at — , while he here claims violation of "his Fifth Amendment privilege against self-incrimination" and deprival of "the pursuit of his calling without due process of law," *id.* at — . The majority says that "[t]he only thing Meyer has held in reserve has been the federal court itself . . . ," *id.* at

Appendix B

— , ignoring the fact that he has also "held in reserve"[2] his Fifth Amendment and due process claims. The considerations set forth in *Mizell, Lombard* and *Kaiser* should apply to all federal claims not asserted in state court, regardless whether other federal claims were asserted in the state action.

The district court in this case refused to consider *Mizell,* because it viewed as controlling the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975), a view correctly rejected by the majority, majority op., *ante* at p. 1370 n.11. *Johnson* held that the filing of a Title VII charge with the EEOC did not toll the statute of limitations applicable to a §1981 action. The *Johnson* case is readily distinguishable from this one in two respects. First, concerns of federalism were not implicated there, since both of plaintiff's avenues of relief were federal. Second, the procedures under Title VII and §1981 were intended by Congress to complement each other, 421 U.S. at 459, and essentially the same claims can be made in both types of actions. Here, by contrast, plaintiff's two avenues of relief derive from different sources of authority and involve entirely different claims, even though the same result (reinstatement) is being sought in both forums. Since constitutional issues raised in the state proceeding cannot be relitigated in the §1983 action, *Lombard v. Board of Education, supra,* 502 F.2d at 636-37, the two forums are, with regard to federal constitutional relief, mutually exclusive, whereas in the *Johnson* situation the Supreme Court emphasized the nonexclusivity of the Title VII and Civil Rights Act procedures, 421 U.S. at 459.

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2. The majority's characterization of certain federal claims as being "held in reserve" by litigants has a disapproving tone that I do not accept. Litigants have a clear, unquestioned right to proceed with separate claims in state and federal forums. Indeed, one inevitable consequence of the majority's decision today is that state court litigants will hold many more issues "in reserve" for federal court consideration.

Appendix B

I would hold that the statute of limitations applicable to Detective Meyer's present claims under §1983 was tolled while he was seeking relief in the state courts.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS DENYING EN BANC RECONSIDERATION

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of March, one thousand nine hundred and seventy-seven.

WALTER MEYER,

Plaintiff-Appellant,

v.

LOUIS J. FRANK, COMMISSIONER OF POLICE, NASSAU COUNTY POLICE DEPARTMENT, ETC.,

Defendants-Appellees.

Filed March 9, 1977
Daniel Fusaro, Clerk

Docket No. 76-7172

Appendix C

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiff-appellant, WALTER MEYER, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1736

WALTER J. MEYER,

Petitioner,

vs.

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department,

Respondents.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Table of Cases

TABLE OF STATUTES

TREATISES

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Respondents.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARGUMENT

It is petitioner's contention that in a civil rights action under Title 42 U.S.C. §§1983 and 1985, the applicable three-year New York statute of limitations should be tolled during the period petitioner sought a remedy in New York State courts. Petitioner requests that this Court issue a Writ of Certiorari and review the order of the United States Court of Appeals for the Second Circuit filed March 9, 1977, which denied en banc reconsideration of the judgment of the United States Court of Appeals for the Second

Circuit, decided January 12, 1977. The Court of Appeals held that the considerations of federalism urged by petitioner were insufficient to outweigh the statute of limitations policy. Respondent respectfully submits that certiorari should be denied.

Petitioner was dismissed from the Nassau County Police Department on June 4, 1971. It was at this time that his right to a Civil Rights Act suit accrued.

When Congress fails to provide a statute of limitations for a federally created cause of action, federal courts should adopt the applicable statute of limitations prescribed by the state in which the controversy originates. (*U.A.W.* v. *Hoosier Corporation,* 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 [1966]; *Swan* v. *Board of Education,* 319 F. 2d 56 [2d Cir. 1963]). This principle is applicable to Civil Rights Act suits. (*Johnson* v. *Railway Express Agency,* 421 U.S. 454, 44 L. Ed. 2d 295 [1975]). State procedural rules which are outcome-determinative shall be followed by a federal court in a nondiversity action brought to enforce a federally created right. (See Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66). The three-year statute of limitations prescribed by New York Civil Practice Law and Rules §214(2) (McKinney's Cons. New York Statutes Anno.) is the most appropriate state statute. (*Montagna* v. *O'Hagan,* 402 F.S. 178, D.C.N.Y. 1975).

Thus, absent a tolling of the statute, petitioner's civil rights action would be barred by the statute of limitations.

Petitioner's initial contention is that a tolling principle is necessary to assure a state court litigant of his supplemental remedies afforded by a §1983 action. Petitioner's contention is without merit. Clearly, one need not exhaust state judicial remedies before he may institute a Civil

Rights Act suit. (*Monroe* v. *Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 [1961]). As the Court in *Monroe* v. *Pape, supra* stated:

> "The Federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183, 16 L. Ed. 2d at 503.

Furthermore, as this Court noted in *Johnson* v. *R.E.A., supra,* "the plaintiff in his §1981 suit may ask the court to stay proceedings" until his other remedies have been exhausted. 421 U.S. 454 at 465, 44 L. Ed. 2d 295 at 304.

Petitioner urges adoption of the rule permitting tolling of a statute of limitations as enunciated in *Mizell* v. *North Broward Hospital District,* 427 F. 2d 468 (5th Cir. 1970), reh. en banc (1970). It must be noted that the *Mizell* rule urged by petitioner has not been adopted in subsequent cases. See *Blair* v. *Page Aircraft Maintenance, Inc.,* 467 F. 2d 815 (5th Cir. 1972), *Jenkins* v. *General Motors Corp.,* 354 F.S. 1040 (3d Cir. 1973), *Ammulung* v. *City of Chester,* 494 F. 2d 811 (3d Cir. 1974), *Graffals Gonzalez* v. *Garcia Santiago,* 415 F.S. 19 (1st Cir. 1976), and *Greene* v. *Carter Carburetor Co.,* 532 F. 2d 125 (8th Cir. 1976).

The court in *Blair, supra,* noted that the tolling of a state statute "would deprive the employer of the right conferred by Congress to expect suit within the time required by law, or not at all, which, of course, is the purpose of all statutes of limitations." at p. 820. Judge Tuttle, author of *Mizell,* stated in his dissent in *Blair* that *Mizell* was reversed *sub silentio. Blair,* at p. 821.

In *Ammulung, supra,* the court, in refusing to apply the *Mizell* principle, stated:

> "Furthermore, given the absence of a federal limitation period in the Civil Rights Act, the court has no basis

for fashioning federal tolling principles, and due regard for our system of federalism requires that state concepts of tolling be applied to state statutes of limitations." At p. 816.

It should be noted that in New York, the tolling of a statute of limitations usually relates to disability of plaintiff (CPLR §208, *Oritz* v. *La Vallee*, 442 F. 2d 912 [2d Cir. 1971]), or some bad faith conduct on the part of defendant (*Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 [1959]). There are no such factors in the present case.

Petitioner relies heavily upon the dissenting opinion of Judge Oakes in *Meyer* v. *Frank*, 550 F. 2d 726 (2d Cir. 1977) to support his argument in favor of adopting the *Mizell* approach. Judge Oakes notes that *Guerra* v. *Manchester Terminal Corp.*, 498 F. 2d 641 (5th Cir. 1974) is evidence that *Mizell* remains good law. But *Guerra, supra,* and other cases that permit a tolling of a statute of limitations, invariably deal with the seeking of an administrative remedy created by Congressional enactment, prior to plaintiff's bringing suit under the Civil Rights Act in Federal court (e.g., the filing of charges with the EEOC, HEW or under FELA). See *Taliaferro* v. *Dykstra*, 388 F.S. 957 (4th Cir. 1975) and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965). As the Court noted in *Burnett*, a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision. 380 U.S. at 434, 13 L. Ed. 2d at 948.

Petitioner cites *Kaiser* v. *Cahn*, 510 F. 2d 282 (2d Cir. 1974) and *Lombard* v. *Board of Education*, 502 F. 2d 631 (2d Cir. 1974) as decisions in harmony with the principles of *Mizell*. The question in *Kaiser* v. *Cahn, supra,* however, was limited to the effect that imprisonment and release

of a prisoner on bail would have on the tolling of a statute of limitations. "Nothing in *Kaiser* compels a decision that the statute should be tolled by the State Court action." (*Meyer* v. *Frank*, 409 F. Supp. 1240 at 1242 [E.D.N.Y. 1976]). *Lombard* may also be distinguished from the present case in that plaintiff in *Lombard* did not raise any constitutional issues in state or administrative proceedings. While petitioner raised the Constitutional issue of the right to be represented by counsel in his Article 78 proceeding.[1] Thus, under *Lombard*, plaintiff's right to bring a Civil Rights Act suit was based on the finding that the State court claim was different from the Federal court claim. In the instant case, one wonders if petitioner is seeking "two bites at the cherry" as he raised a Constitutional issue in his Article 78 proceeding and now seeks to raise Constitutional issues in his Civil Rights Act suit. *Lombard, supra,* at 637.

Finally, in considering petitioner's argument that support of a tolling principle lies in consideration of promoting the interests of federalism, see the majority opinion in *Meyer* v. *Frank*, 550 F. 2d 726 (2d Cir. 1977) at 29, (Petitioner's Brief, Appendix B at 14a). The appellate court below observed the following:

> "Meyer invites us to apply *Mizell* here. Assuming arguendo our agreement with the result reached there, the history of the instant litigation forecloses application here of the full force of the Fifth Circuit's reasoning. Meyer did not restrict his Article 78 petition to

[1] On July 15, 1971 the Article 78 petition was dismissed by Justice Pittoni of the Nassau County Supreme Court. The Appellate Division, Second Department, affirmed without opinion on October 10, 1972, 40 App. Div. 2d 760, 336 N.Y.S. 2d 239 (2d Dept. 1972), and denied Meyer's motion for reargument on January 19, 1973. In May 1973, the New York Court of Appeals denied leave to appeal (mot. for lv. den. 32 N.Y. 2d 612).

> claims grounded in state law. Alleged violations of his Sixth Amendment rights to counsel and confrontation of witnesses were at the core of his petition. This is not a case like *Mizell* where the prior state court proceeding was directed at obtaining relief through an action grounded solely in state law. . . The only thing Meyer has held in reserve has been the federal court itself, federal law has played a principal role all along. The result is that the policy of avoiding federal interference with state affairs survives here in a diluted posture."

Petitioner, here, has slept on his rights and should not now be able to assert a federal claim. (*Burnett* v. *N.Y. Central R. Co., supra,* at 428.)

Petitioner, like plaintiff in *Mizell,* "chose his forum and litigated to the last ditch." *Mizell, supra,* at 476. Chief Judge Coleman's dissenting opinion in *Mizell* observed that Dr. Mizell having lost in state courts was then permitted to start over in federal courts. Judge Coleman then asked the rhetorical question that is equally applicable here: "Federalism, where art thou?". *Mizell,* Id.

Where Congress has created a cause of action without limiting the time within which it may be brought, it is reasonable to infer . . . that adoption of the limitation periods of the State is what Congress did intend. Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66, at 97.

It is suggested that if a tolling principle as enunciated in *Mizell* is ever deemed desirable, it should come from the Legislature.

CONCLUSION

For the reasons stated above, the petition should be denied in all respects.

Respectfully submitted,

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